THE DIFFICULTIES OF EXTRADITION[1]

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IF I were asked to mention a subject that would clearly illustrate the slowness with which the human mind may rid itself of primitive conceptions that have ceased to have any foundation in existing conditions, I should not hesitate to suggest the subject of extradition. It is admitted that there exists in every community, no matter how highly developed and generally civilized, a certain amount of evil, and that for the suppression of such evil penal laws must be made and enforced. As applied to itself, each country regards this fact as self-evident and considers the repression of crime to be among the first, if not the very first, of its duties. But the moment a national boundary line is crossed, a change seems to come over the spirit of our dreams. The criminal becomes an object of special consideration, if not of sympathy. There is a tendency to regard him as persecuted rather than as simply prosecuted. The stern demand for the relentless enforcement of the law is quickly paralyzed by suspicion, while efforts to defeat its enforcement are viewed with complacency if not with warm approval.

Primarily, these contradictory phases of mental and moral action are to be ascribed to the fact that international jealousies, often narrow and uninformed, have caused the survival among nations of the conception of asylum, which every civilized nation has banished from its own law. In its original sense the word "asylum" was highly descriptive, and was applied to privileged places devoted to special uses, among which was that of shelter for the fugitive. If the fugitive could reach such a place, he was safe from pursuit, and had gained for himself a

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right to protection which could not be violated. This right was the "right of asylum." It was the natural product of the conditions under which it arose. The inspiration of the ancient criminal law was the principle of vengeance; and the right of private vengeance was fully recognized. The slayer was pursued by the avenger of blood, and if overtaken was summarily killed. It is not strange that under systems based so completely upon the *lex talionis*, sentiments of religion and of humanity, as well as of justice, should have suggested means of escape from undiscriminating violence.

As suspicion declined and private vengeance was displaced by the regulated action of judicial tribunals, the privileged places of refuge ceased to exist; but all the ideas with which the practise of asylum was identified did not perish with them. From having been so long accorded, hospitality and protection had come to be regarded as the fugitive's privilege, and in the end each separate state became a refuge for offenders against the laws of other nations. The term "right of asylum," though still used in this relation, gradually lost its ancient fitness. As the administration of justice improved and the distrust of foreigners abated through the familiarity of intercourse and the perception of common social interests, nations came to understand their rights and duties better, and the notion that protection was a right belonging to the fugitive disappeared. In its place there was established the right of the state either to extradite or to expel any offender who comes within its jurisdiction. Nevertheless, the so-called right of asylum continued to survive to the extent that each government claimed the right to grant asylum to fugitive offenders if it should see fit to do so. This right, it is true, is now generally admitted to be coupled with the duty, which is amply acknowledged by the multiplication of extradition treaties, to abstain from asserting the sovereign power for the purpose of shielding criminals in all cases from trial or punishment by the competent authorities of the country whose laws they are charged with having violated. But the idea of asylum, as regards fugitives from the justice of foreign countries, still so far prevails in the popular mind that it has prevented the system of extradition from being

placed on the broad foundation which the interests of society require.

Extradition is the act by which one nation delivers up an individual, accused or convicted of an offense outside its own territory, to another nation which demands him, and which is competent to try and punish him. Why should obstacles be placed in the way of the performance of this act by civilized nations?

That such obstacles do exist is undeniable; but they do not exist to an equal extent in all countries. On the continent of Europe, extradition is to a great extent treated as an administrative process. In England, and in the United States, the process is partly administrative and partly judicial; but it is in the United States and in some of the British dominions that the combination of the two procedures has been carried farthest and with results obstructive to the administration of justice.

With the exception of the twenty-seventh article of the Jay treaty, which expired in 1807, the first extradition treaty negotiated by the United States was that contained in the tenth article of the Webster-Ashburton treaty of 1842. By this treaty it was provided that a fugitive should be delivered up on such proof of guilt as would justify his commitment for trial in the country in which he was found, if the crime had been there committed. This rule was embodied in other treaties subsequently negotiated, and has been generally incorporated in the extradition treaties of the United States. The examination of the question of guilt was committed to the judicial magistrates. If those magistrates found that there was "probable cause," the fugitive was committed for surrender; and the issuance of the warrant of surrender by the executive was regarded as purely ministerial. This was the actual rule down to 1871. In that year, without any statement of reasons, the executive in a certain case disregarded the finding of the judicial magistrate and refused to issue a warrant of surrender; and since that time the power has been frequently asserted. In this manner a serious difficulty was put in the way of extradition. Even after a long and expensive judicial examination, with writs of habeas corpus and appeals, there was no longer any assurance that a judicial commitment

would be followed by the delivery up of the fugitive. There is, in fact, in our records, one case in which a fugitive from the justice of Canada was three times successively committed by the judicial authorities for surrender, and was three times successively discharged by the executive, the application for his extradition thus failing altogether. Several years afterwards this special object of solicitude and protection was convicted by our own courts as an opium smuggler.

Another difficulty has been that by the decisions of some of our courts the raising of petty technical objections has at times been much encouraged. By the decisions of other courts, and especially by those of the Supreme Court of the United States, the raising of such objections has been discouraged. But, as the raising of them, whether encouraged or discouraged, is gratifying to the fugitive and profitable to his counsel, they have by no means disappeared from our procedure.

The raising of technical objections has been facilitated by defects in our statutes. These statutes present a conglomeration of enactments, some of which are in their terms altogether inappropriate to the process. It is a fact that, twenty-five years ago, but for the misinterpretation of one of these statutes by the courts, extradition with Great Britain and perhaps with other countries would have broken down. At that juncture, an attempt was made to replace the existing inconsistent enactments with a comprehensive statute which it was believed would simplify and facilitate the execution of our treaties; but the attempt failed owing to the pressure of other business upon Congress and the lack of any general public interest in the subject. The courts have consequently gone on living from hand to mouth.

The result of the conditions which have been indicated is that the process of extradition from the United States has been exceedingly expensive. In one case it cost the French government nearly 200,000 francs, or $40,000, to obtain the extradition of certain fugitives. This case probably furnishes the high-water mark of expenses in extradition proceedings, unless it be exceeded by the scandalous case of Gaynor and Greene; but it has not been uncommon for the cost to amount to from $5,000 to $6,000 in a particular instance.

This obviously creates a real difficulty in the way of extradition. In the case of one government having an extradition treaty with the United States, this difficulty was once diminished in a systematic fashion. The minister of the country in question made rather frequent applications for preliminary warrants or mandates for the arrest of fugitives, but rarely afterwards applied for warrants of surrender. One day when he was applying for a preliminary paper, the remark was made to him that he seemed to have bad luck with his cases, since he apparently seldom obtained the extradition of his fugitives. He replied that, far from having bad luck, he was meeting with uniform success; and, seeing that his meaning was not fully comprehended, explained that, as he had found the pursuit of the ordinary legal process to be troublesome, expensive, and altogether uncertain, he had followed a plan of his own. This plan was to offer to the fugitive a first-class steamer passage, with plenty to eat and to drink, and a hint that his only hope of leniency might lie in a voluntary return. The cases were, he said, extremely rare in which this method failed to work; and he had found it to be more economical than the employment of counsel and the payment of costs.

Now, the point which I specially desire to make, is, can any one give even a plausible reason for the existence of such a state of things? Let us analyze the subject into its elements. We have for years had upon our statute books laws by which we have repelled or expelled from our shores alien immigrants by the thousand without the slightest compunction. The grounds of exclusion have repeatedly been enlarged, till the prohibited classes embrace idiots, epileptics, and persons afflicted with a loathsome or with a dangerous contagious disease; insane persons, and persons who have been insane within the five preceding years or who have had two or more attacks of insanity at any time; paupers, professional beggars, or persons likely to become a public charge, of which likelihood the possession of less than fifty dollars is considered as proof; polygamists; persons convicted of a non-political crime or misdemeanor involving moral turpitude, whether they have or have not served their sentence; prostitutes or procurers; anarchists, or persons who

believe in or advocate the violent overthrow of the United States government or of all government or all forms of law, or the assassination of public officials; and persons under contract to labor, with the exception of persons belonging to the professional classes, persons employed strictly as personal or domestic servants, and skilled laborers of a class in which none unemployed can be found in the United States.

Instead of obstructing the execution of these laws, we make a general demand for their rigorous enforcement. Let an alien come to our shores who is guilty of the omission to have fifty dollars, and we send him back without hesitation to the country from which he came. Let him come with the guilt resting upon him of murder, burglary, arson, or other crime, and we cover him with the mantle of our protection and extend to him the sympathy due to a hero and a martyr. In other words, call our statute an immigration law, its enforcement is commended and arouses no suspicion; call it an extradition law, and large opportunities are afforded to evade and defeat it.

This difference in mental attitude appears to be due to primitive association and prejudices. And yet, although the United States has had extradition relations with foreign governments on an increasing scale since 1842, in all that time there has not been a single case in which it has been shown that the process of extradition was abused.

Coming to the practical aspects of the matter, I would venture to make certain suggestions.

In the first place, every nation should have a general law authorizing the executive or administrative authorities to deliver up fugitives from justice, specifying the cases in which this may be done, and regulating the procedure to be followed. The operation of this law might be made to depend upon reciprocity, by treaty or otherwise, for the most part, but not wholly.

In the second place, may not the extent to which a fugitive shall be permitted to go in resisting extradition, be made to depend upon his nationality? If he be a citizen of the country from which his extradition is demanded, in other words if his surrender involves the taking of him from his home, the establishment of probable cause of guilt may be required to be made

under special safeguards. If, on the other hand, he be an alien, there appears to be no reason why he should be entitled to anything more than a fair examination before some one judicial or administrative authority designated for the purpose. Certainly this is so with regard to a person who is a citizen of the country by which the demand for extradition is made. The fact that he has committed a crime, or is charged with having committed it, should not entitle him to greater consideration than is shown to the immigrant who comes to us without any shadow of guilt or wrong-doing.

In the third place, a distinction should be made between persons charged with crime and persons convicted of crime. Under the immigration law, the immigrant is sent back to the country from which he comes upon the bare fact of his conviction; and this is the case without regard to the question whether the country from which he comes is or is not the country in which he is under sentence. No reason can be given why, if the fugitive from justice is called an immigrant, he is returned upon the fact of his conviction, while, if the immigrant is called a fugitive from justice, the question of his guilt should be re-examined.

To what I have said, an exception is to be made in the case of political offenders. It is a general principle, upon which governments act, that, if the offense with which the fugitive is charged or of which he has been convicted is of a political nature, he is not to be surrendered. For the examination of this question, the amplest opportunity should always be afforded.

We may now briefly consider the subject of the recovery of fugitives from justice as between the states of the United States. Since 1891 this process has gradually come to be technically described as interstate rendition, but it is still often spoken of as "extradition." The latter term is, however, as applied to the interstate proceeding, inaccurate and misleading. On the supposition that they were dealing with extradition in the true and international sense, public officers and law writers have sometimes consulted the principles of international law and applied them to a subject which they do not govern. The transfer of an accused person from one part to another of a country having a

common supreme government is not an international proceeding. Clearly it is not so as between the states of the United States.

Sub-section 2, section 2, article 4, of the constitution reads as follows: "A person charged in any state with treason, felony, or other crime, who shall flee from justice, and be found in another state, shall, on demand of the executive authority of the state from which he fled, be delivered up, to be removed to the state having jurisdiction of the crime." Both the scope and the character of this provision show that it is not in the nature of an engagement between foreign and independent nations. The general principles of international law exclude the surrender of political fugitives; the provision in question, framed by men who had just been engaged in a revolution, expressly requires surrender for treason. Moreover, there is no restriction as to the offenses for which delivery may be demanded; international conventions either enumerate and define the extraditable crimes, or else by a general clause confine the operation of the treaty to offenses of a certain gravity. The reasons for the sweeping provision of the constitution are obvious. Among the purposes for which the constitution was declared to be ordained were "to form a more perfect union, establish justice," and "insure domestic tranquility." Each state was guaranteed a republican form of government; due process of law was secured; and the states were forbidden to pass any bill of attainder, or *ex post facto* law. Thus mutual confidence and mutual aid were worked into the fabric of the union; and the duty of rendering up fugitives from justice was imposed without limitation in order that the law might everywhere and in all cases be vindicated. The right to grant asylum, generally denominated "the right of asylum," upon which so many of the fundamental rules of extradition depend, was excluded as between the component parts of the United States.

The provision in the constitution for the rendition of fugitives from justice involved no new principle. It merely prescribed a method of accomplishing what had under different conditions been done in another way, and substantially confirmed a pre-existing practise. For example, it had been the custom as between Pennsylvania, New Jersey, Maryland and Delaware to

permit a fugitive from justice to be taken upon a warrant signed by the chief justice of the state or colony from which he escaped and indorsed by the chief justice of the state or colony in which he was found. A similar custom prevailed elsewhere.

By act of February 12, 1793, Congress undertook to make the constitutional obligation effective. This act made it the duty of the executive authority of the state or territory in which the fugitive should be found to deliver him up, upon the production of a demand accompanied with a copy of an indictment found or with an affidavit made in the demanding state or territory and certified by the governor or chief magistrate thereof as authentic, charging the fugitive with the commission of a crime.

For fifty years the constitutional provision was executed substantially without judicial interference. In 1842, however, in the case of *Ex parte* Smith (3 McLean, 121), a prisoner, who was held under a warrant of surrender, was discharged on *habeas corpus* on the ground that the requisition did not disclose sufficient evidence to show that he was a fugitive from justice. After this decision, the courts began to grant writs of *habeas corpus* with increasing frequency; and while, in some cases, the courts held that they could go no further than to see that the papers were in due form, in other cases they did not hesitate to review the governor's action. In this way the entire process gradually came to be the subject of judicial review. Statutes were also adopted in various states for its regulation. Moreover, the governor of the state in which the fugitive was found would sometimes, without legal reason or excuse, refuse to surrender him; and it was held by the Supreme Court of the United States in the case of Kentucky *v.* Denison (24 Howard, 66), in 1860, that the governor of a state was an official so exalted that he could not be compelled by a writ of mandamus to discharge his constitutional duty, no matter how plain it might be.

In 1887, Governor Hill of New York, with a view to remedy the existing confusion, took steps which resulted in the holding of a conference of representatives of the various states in the city of New York for the purpose of securing the adoption of a uniform system of rules and practise. A set of rules, closely

following rules which Governor Hill had himself adopted two years before, was drawn up and was afterwards put into force in many of the states and territories. But these rules, while they tended to secure uniformity of executive practise, could not extend to or regulate the practise of judicial review, nor could they compel a governor to discharge his duty where he saw fit, for political or other reasons, to disregard it.

As the result of the conditions which have been described, the process of interstate rendition obviously stands in need of regulation. Such regulation could best be secured by substituting for the meager act of 1793 a comprehensive federal statute, which should be exclusive in its operation. And as it has been held by the Supreme Court that the governor of a state cannot be compelled to discharge his constitutional duty, it would, as the constitution does not designate the official to whom the demand for rendition shall be addressed, be competent in such an act to relieve the state executives of the duty of surrender altogether, and to impose it upon some other official, perhaps upon some judicial officer, so as to do away with the present combination of executive and judicial action, a combination which, although it affords large opportunities of escape to fugitives who have money to spend, does not tend to promote the ends of justice or respect for law. For it is always to be borne in mind that, in extradition and in interstate rendition, the question to be determined is not whether the accused is guilty or innocent, but whether he is duly charged with crime, and that the refusal to deliver him up on a proper charge means simply that legal justice shall not in his case be administered.